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ABSTRACT

Reported are the proposed policies and procedures regarding grants to States, nonprofit agencies, organizations, colleges, and universities pursuant to the Developmental Disabilities Services and Facilities Construction Act of 1970 (Public Law 91-517) as amended by the Developmentally Disabled Assistance and Bill of Rights Act of 1975 (Public Law 94-103). The section on general provisions sets forth the policies and procedures which apply to all of the subsequent parts, such as definition of terms, grant procedures, and other administrative concerns. The section on formula grant programs is divided into four basic subparts as follows: subpart A pertaining to State plans, subpart B relating to State planning councils, subpart C concerning the protection and advocacy of individual rights, and subpart D establishing the practice and procedure for hearings pertaining to State conformity with State Plans for the developmentally disabled and with Federal requirements. The section on the proposed discretionary grants program addresses university affiliated facilities (including demonstration and training grants and construction programs), and special project grants. (IM)

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PART II:

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DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office of Human Development

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DEVELOPMENTAL DISABILITIES PROGRAM

Proposed Policies and Procedures Regarding Grants to States, Nonprofit Agencies, Organizations, Colleges and Universities

EC090990

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office of Human Development

[45 CFR Parts 1385, 1386, 1387]

DEVELOPMENTAL DISABILITIES PROGRAM

Proposed Policies and Procedures Regarding Grants to States, Nonprofit Agencies, Organizations, Colleges and Universities

Notice is hereby given that the regulations set forth in tentative form below are proposed by the Assistant Secretary for Human Development with the approval of the Secretary of Health, Education, and Welfare.

The purpose of the proposed regulations is to implement provisions of the Developmental Disabilities Services and Facilities Construction Act of 1970 (Pub. L. 91-517), as amended by the Developmentally Disabled Assistance and Bill of Rights Act of 1975 (Pub. L. 94-103), hereafter referred to as "the Act." The program is administered by the Developmental Disabilities Office, Office of Human Development.

The new Act is designed to assist States to develop a comprehensive plan which will bring together all available resources so that the developmentally disabled may be served in the most effective, efficient way. The new Act does not provide for separate funds to meet all the needs of the target population; rather it establishes the means for accessing the systems already in use for the general population and encourages special adaptations of these generic services. Funds are to be used to fill gaps in existing generic services and to expand the reach of existing services to new groups of individuals.

Other provisions include establishment of the State planning council as the means for accessing and coordinating generic services, for identifying gaps in services, and for planning ways of filling the gaps. State planning council requirements include supervision of the development of the State plan; approval, mointoring, and evaluation of the implementation of the plan; review, to the extent possible, of all plans in the State which relate to programs affecting persons with development disabilities; and submission of regular reports on its activities. The State planning council is required to serve as an advocate for persons with developmental disabilities. The Act calls for the State plan to designate one or more State agencies to administer the State plan.

The Act adds a new program of special projects and a new formula grant program for the protection and advocacy of *individual* rights of the developmentally disabled. Other changes brought about by the new Act include a broadened definition of developmental disabilities; increased emphasis on deinstitutionalization of the developmentally disabled by alternative community placement, where possible, and improvement of institutional services; establishment of a State data base and ongoing evaluation activities; increase in the program focus on urban and rural areas of poverty; and establishment and protection of the rights of persons with developmental disabilities (section 113 of the Act), including implementation of individualized habilitation plans and advocacy of individual rights.

Regulations for the new programs and concepts are herewith included. These regulations have been divided into separate Parts to make clear to the general public which specific regulations apply to the different programs administered by the Developmental Disabilities Office, and include a general part to make it easier for the public to locate those regulatory provisions which apply to all or almost all of the different program areas.

The principal purpose of these regulations is to ensure the continued targeting of funds and resources to developmentally disabled individuals through a national, State, and local partnership. To this end, the goal of the program is to enable States to increase the provision of quality services to persons with developmental disabilities through the designs and implementation of a comprehensive and continuing State plan which makes optimal use of Federal, State, local, and private resources, and assures the rights and dignity of all those being served.

A second, but not secondary, purpose is to specify the rights of the developmentally disabled: That developmentally disabled persons have the right to appropriate treatment, services, and habilitation; that programs should be designed to maximize the developmental potential of the person; and that the Federal Government and the States have an obligation to assure that public funds are not provided in programs which do not deliver appropriate treatment, services, and habilitation or do not meet appropriate minimum standards as specified in the Act.

Certain sections of the Act are not included in these proposed regulations. These parts of the Act direct the Secretary to carry out certain activities which are general and administrative in character and do not directly or immediately affect grantees. Accordingly, regulations are not developed for the amendments which revise the components and functions of the National Advisory Council on Services and Facilities for the Developmentally Disabled, hereafter referred to as the National Advisory Council; the conduct of special studies required by the Act, which will be guided by the general policies and procedures governing such activities, modified, as necessary, by the specific requirements of the law; and the administrative aspects of the special projects authority for projects of national significance. Additional information will be published in the FEDERAL REGISTER from time to time as necessary.

It should be noted that the regulations for formula grants to States and grants to university affiliated facilities are removed from Chapter IV of Title 45 of the Code of Federal Regulations and are relocated in Chapter XIII, which covers all programs administered by the Office of Human Development within the Department of Health, Education, and Welfare.

PART 1385—GENERAL

The purpose of this general part of the regulations is to bring together in one place those provisions which are applicable to the other parts of the regulations. The basis for this is the Department's belief that this will make it easier for members of the public to locate such provisions, and that it will avoid unnecessary duplication which would occur if each of the provisions of general applicability had to be repeated in the other parts of the proposed regulations.

This part sets forth the policies and procedures which apply to all of the subsequent parts, such as definition of terms, grant procedures, and other administrative concerns. Part 1385 essentially follows standard Federal policies and procedures, except where specific differences, such as assurances regarding an evaluation system, are required by the Act.

Section 1385.1 of these regulations is aimed at stating the Department's view of the purposes of the Act and is based on the Department's belief that such an expression clearly sets the ground rules and the context for the rest of the regulations.

Section 1385.2 contains definitions of terms applicable to all of the other parts of the regulations.

Section 1385.3 incorporates the provisions of 45 CFR Part 74 and is based upon the Department's belief that it is advantageous to all concerned to follow uniform administrative requirements and cost principles to avoid or minimize mistakes and misinterpretations of administrative provisions since States are generally familiar with Part 74 requirements.

Sections 1385.4, 1385.5 and 1385.6 incorporate into the regulations provisions contained in the statute itself. The Department believes that these provisions (judicial review, State control of operations, and employment of handicapped individuals) are mandatory and that it is helpful, from the standpoint of clarity, to restate these requirements in the regulations.

Sections 1385.7, 1385.8, 1385.9, and 1385.10 also incorporate provisions contained in the statute. The purpose of restating these requirements (recovery, good cause for other use of facility, cooperative or joint effort between States and agencies, and awards) is to avoid any possibility of oversight by the public about these requirements. The basis of these regulations is the belief that they will help alert public and private agencies and members of the public to the existence of these requirements.

Lastly, § 1385.11, concerning assurances regarding evaluation systems, is also for the purpose of incorporating in the regulations an express, statutory provision. The Department believes it is advisable to make clear that compliance with the requirement for the develop-

ment of an evaluation system is a condition for the receipt of Federal financial assistance under the other parts of the regulations. The purpose of this regulation is to make that point absolutely clear. The Department believes that any condition of Federal financial participation or assistance should be expressly stated in regulations.

PART 1386—FORMULA GRANT PROGRAMS

The purpose of this part of the proposed regulations is to govern the conduct of the Formula Grant Programs and to take cognizance of and implement the changes brought about by the 1975 amendments. Part 1386 is divided into four basic Subparts as described below.

The general provisions of Subpart A, pertaining to State plans, consist of §§ 1386.1 through 1386.4. These regulations are designed to implement the requirements of section 133 of the Act pertaining to State plans, and to define further what that provision requires. The Department believes that these regulations give the greatest assurance that States will, in fact, submit approvable State plans prior to the beginning of the fiscal year, and that the Department will have adequate time to review such submissions properly.

In addition, the Department believes it necessary to make it clear to all States that submission of a State plan at the beginning of a fiscal year is a requirement for Federal financial participation, and that failure actually to submit such a plan will result in the loss of Federal funds for that period of time during which there is no approved State plan in effect.

It is the Department's belief that it is the intention of Congress that the State plan be a viable management tool that reflects the State planning process and the rationale through which expressed needs, priorities, and resource allocations are determined so as to provide the basis for the expenditure of funds under the program. Performance standards, to be issued by the Secretary, will provide criteria for evaluation and approval of the State plan. They may also be used as a tool by the State planning council to develop the State plan.

The Department further believes that Congress has intended that money be paid to States only pursuant to an approved State plan. In the past, some States have failed to submit their plans in a timely manner and this has resulted in a decreased ability on the part of the Department to assure that funds are, in fact, properly paid and properly utilized. Thus, § 1386.2 requires States to submit proposed plans 60 days prior to the fiscal year to which the plan applies. This time period was selected because of the Department's experience that such a time period would be reasonable to allow for review of proposed State plans.

Furthermore, to ensure that States comply with these requirements, this regulation is designed to make it clear that no Federal financial participation will be provided to a State for any period of time during a fiscal year in which an approved State plan is not in effect. The purpose of this regulation is to encourage States to do advance planning, and it is based on the Department's belief that such an approach is necessary to ensure compliance with the statutory requirement for an annual State plan. This position represents a departure from past practice and is believed necessary because several States have, in the past, failed to submit approvable plans until a significant portion of the fiscal year had elapsed.

This subpart also effectuates the amendments to the basic formula grant program which had been in operation for five years and details the requirements which a State must meet in its State plan to participate in the program. These proposed regulations are based on the Department's belief that they best implement key Congressional policies associated with the formula grant programs.

For example, based upon the legislative history, the Department believes that Congress wished to highlight the crucial advocacy role and strengthen the supervisory, planning, and monitoring functions of the State planning councils to meet increased responsibilities effectuated by the 1975 amendments, leaving the actual day-to-day administration of the programs to the designated State agencies. The Department also believes that the regulations in Subpart A accomplish that goal.

The next section under Subpart A is concerned with allotments, Federal share, and payments of Federal money to the States. These provisions, which encompass §§ 1386.10 through 1386.17, essentially are designed to implement various statutory provisions and do not constitute any major innovations brought about by the statute or by interpretations of the statutory provisions. However, particular attention is directed to proposed § 1386.10(b) which defines the need factor referred to in section 132(a) of the Act. The Act itself refers to allotments being made to States on the basis of the population, the extent of need for services and facilities for persons with developmental disabilities, and the financial needs of the respective States. The statute, however, does not define what is meant by "need" and the purpose of this regulation is to do so. It is based upon the advice of the National Advisory Council and represents what the Department believes to be the best approach available at this time based upon information and comments currently before the Agency.

For the first year of the program, the measure of need adopted was the incidence of developmental disability as reflected by the proportion of the population in the State under age 18. This age was substituted for the age 21 factor used in the former mental retardation program formula, because it corresponds to the age criterion in the definition of developmental disabilities in the Act. The data for measuring need utilized after the first year came from the Social Security Disability Applicant Statistics published by the Social Security Administration and updated periodically. The actual data selected are the number of beneficiaries in the State under the Adult Disabled Child Program as an index of relative need of the State for services and facilities for the developmentally disabled. It is the Department's belief that these data are the best that are available. Suggesions for alternative need data, or for definition of need to determine the extent of need for services and facilties for persons with developmental disabilities for State allocation purposes, are solicited during the comment period.

Further attention is directed to proposed § 1386.14 which relates to nonduplication of funds and which implements section 136 of the Act. This provision differs from preceding provisions due to a change in the law which no longer permits the use of Federal funds for matching even though other Federal legislation allows it:

> In determining the amount of any State's Federal share of the expenditures incurred by it under a State plan approved under section 133, there shall be disregarded (1) any portion under any provision of law other than section 132, and (2) the amount of any non-Federal funds required to be expended as a condition of receipt of such Federal funds.

This will bring about a change in past Department practice, and funds which had been used in the past for matching will, in some cases, no longer be able to be used in such a manner. An example would be funds provided under the Appalachian Regional Development Act. All questions arising under this regulation will, absent an express reference to this Act in subsequent Federal legislation, be referred to the Department's Office of General Counsel for opinion and/or interpretation.

It should be noted that § 1386.17(a), "Standards for services for persons with developmental disabilities," will be published in the FEDERAL REGISTER upon completion of a special study mandated by the Act.

The next subdivision of Subpart A relates to "State Plan Requirements—Methods of Administration," and includes §§ 1386.20 through 1386.31. These regulations are based on the Department's belief that carrying out the purposes of the Act in this area is best accomplished by incorporating in the regulations the requirements and provisions of the Act, clarifying exactly what the Act requires, and, in the case of § 1386.24, specifying the reports which the Secretary deems necessary in this area for purposes of assuring proper operation of the State plan.

The regulations pertaining to personnel administration, special assistance to poverty areas, use of volunteers, protection of employees' interests, etc., are based strictly on the statute and upon the Department's belief that these essentially straightforward provisions allow the greatest flexibility in carrying out technical matters.

The purpose of § 1386.23 is to restate the statutory requirement that the State plan provide that special financial and technical assistance be given to areas of urban or rural poverty in providing services and facilities for persons with developmental disabilities who are residents of such areas. The Joint Conference Report No. 94–473 (page 28) notes that Congressional intent is that these regulations define the poverty areas in the manner required by the National Health Planning and Resources Development Act (Pub. L. 93–641.) Regulations implementing this latter Act have not yet been issued by the Department, and under that Act, until the areas can be determined for the entire country, it cannot be determined on a State-by-State basis. Accordingly, in the interim, until regulations are issued for Pub. L. 93–641, the Department in only requiring that State plans provide for this special financial and technical assistance to areas of urban or rural poverty.

This provides States the maximum flexibility possible until such time as Pub. L. 93–641 regulations are issued. When they are issued, such changes as may be necessary to these regulations will be announced through standard FEDERAL REGISTER procedures. It was deemed advisable not to attempt to spell out in § 1386.24 all of the reports that the Department would or might require, but rather to leave such additional detail to subsequent instructions from the Department.

Sections 1386.28 through 1386.31 incorporate substantive aspects required in the statute for a State plan: Membership of the State planning council, identification of State council staff, review of all other State plans, and systematic review of the State plan. The purpose of these regulations is to emphasize that State planning councils, the core planning authority in the State essential to the maximum effective utilization of available existing and potential resources, can best function when adequately staffed and in an environment of coordination and mutual cooperation with all State agencies concerned with planning or implementation processes related to the program. The basis for these regulations is the Department's belief that the Act is designed so that the State planning council can have the capacity for getting cross-agency cooperation in carrying out its duties.

The Department further believes that this requires that the State planning council and State agency(ies) complement each other's functions through effective working relationships. These regulations restate the statutory requirements to make it clear that planning council members and staff are required to review their own and other State plans, and that such analysis, as a component of a systematic planning process, contributes information on needs, actual and potential resources, and to the development of short-term objectives to meet long-term goals. It also contributes to the development of council insight into the best methods to effect cross-agency coordination to develop a reliable system of services for the developmentally disabled persons in the State.

The next major area of concern relates to the provision of services and construction of facilities and consists of the proposed regulations found in §§ 1386.40 through 1386.49. The purpose of this subdivision of Subpart A is to insure that, through the description of clearly defined long-range goals and measurable short-term objectives, with primary consideration given to implementing the goals of the Act (deinstitutionalization of the developmentally disabled, early identification of those needing assistance, and provision of protective services, advocacy, and follow-along services) allocations of funds can be based on State priorities. At the heart of these provisions are the regulations at §§ 1386.42 through 1386.45.

The Department believes that detailed requirements are advisable in § 1386.46, dealing with the quality, extent, and scope of services, based upon the assumption that knowledge of such requirements will compel careful consideration of the types of services and assistance being provided to the developmentally disabled.

Similar reasoning relates to § 1386.47, dealing with habilitation plans which are required by the statute. In order to eliminate or reduce the possibility of confusion as to what is meant by a habilitation plan, it was deemed advisable to incorporate the statutory details in the regulations in order to give the greatest guidance with respect to this requirement.

Section 1386.48, dealing with the program for construction of facilities, is designed to set forth the purposes for which such construction programs are proper, and to require assessment of relative need and assignment of priority in order of relative need. It is the Department's belief that such a requirement will help to ensure planning for the best use of limited funds.

The last regulation in this group is § 1386.49 which, consistent with the statute, requires States to afford opportunities for appeal and hearing to applicants for construction projects who are dissatisfied with any action of the State with respect to an application for such a project.

The last subdivision of this subpart, § 1386.50, deals with the design for the implementation of the State plan. This provision is based on section 133(b)(25) of the Act. The purpose of the regulation is to set forth the Department's view as to what must be included in a design for implementation of the State plan in order for it to meet statutory requirements through the selection of the best methodology to achieve the goals and objectives developed by the State planning council. The Department believes that this regulation accomplishes the purpose of informing the States of the essential elements of a valid design, especially the review of alternative strategies, without denying them the flexibility to tailor such a design for implementing the State plan to their specific needs.

Subpart B relates to State planning councils. Proposed §§ 1386.60 through 1386.63 are designed to implement section 137 of the Act which sets forth the duties and responsibilities of State planning councils. These provisions, especially those found in §§ 1386.60 and 1386.63, are based on the Department's belief that the 1975 amendments (Pub. L. 94–103) broadened the responsibility of State planning councils in advocacy, planning, and evaluation. These regulatory provisions provide the statutory specificity regarding the role of the State planning councils, membership, and duties of those councils.

The basis for specifying in § 1386.61(b) the Federal/State program membership on State planning councils is section 133(b)(A) of the Act which requires that a State plan describe the quality, extent, and scope of services provided, or to be provided, under other State plans, but in any case to include the nine programs listed. It is the Department's belief that this requirement in the statute necessitates State council representation of at least these nine programs. The purpose of this regulation is to enable States to meet the statutory requirement to develop an approvable State plan. The Department further believes that this provision, which supports Congressional intent, allows for maximum flexibility in council membership since in many States one member could represent more than one of these program areas and since there is no restriction on the number of council members that may be appointed.

One of the purposes of the Department in promulgating § 1386.63 is to ensure that State planning councils supervise the development of State plans through the provision of guidance, the establishment of goals and objectives, identification of gaps, and the setting of priorities for the allocation of funds. The day-to-day implementation of the State plan is the responsibility of the State agency(ies) designated to administer it. The activities of these designated agencies will be monitored and evaluated through the methods established by the State councils to ensure that goals and objectives established in the State plan are being achieved.

Subpart C concerns the protection and advocacy of individual rights and consists of a single proposed regulation, § 1386.70. The purpose of this regulation is to implement section 113 of the Act by incorporating into the regulatory structure the statutory requirements. The regulation includes provisions for assurances that the States will have a system in effect by October 1, 1977, to protect and advocate the rights of individuals with developmental disabilities as specified in the statute, and that such a system will be independent of any State agency which provides treatment, services, or habilitation to such persons.

The regulation does not attempt to establish a single method of implementing the statutory provisions. It is the Department's belief that different approaches may be utilized in order to achieve the substantive goal of establishing an independent agency to pursue the rights of the developmentally disabled. The Department believes it desirable to give States flexibility in the development of such a system. However, guidelines which will assist in the development of an advocacy plan will be issued by the Department to insure that the statutory provisions of section 113 are implemented. This regulation imposes no restrictions on the choice of the agency to plan the system. Rigid restrictions, however, are placed on the agency to be selected or established to implement the system by the Act.

The basis for this is to avoid all possibility of conflict of interest because this system has been established in section 113 of the Act for the purpose of addressing problems of individuals. It is the Department's belief that the State council's advocacy role is to be carried out on behalf of the developmentally disabled population as a whole within a State, and that the basic principle underlying the establishment of the protection and advocacy system in each State is that individuals who are developmentally disabled need to be able to reach outside the system of services in order to assure that their rights are not violated or diminished.

The Act makes these findings respecting the rights of developmentally disabled persons:

(1) Persons with developmental disabilities have a right to appropriate treatment, services, and habilitation for such disabilities.

(2) The treatment, services, and habilitation for a person with developmental disabilities should be designed to maximize the developmental potential of the person and should be provided in the setting that is least restrictive of the person's personal liberty.

(3) The Federal Government and the States both have an obligation to assure that public funds are not provided to any institutional or other residential program for persons with developmental disabilities that—

(A) Does not provide treatment, services, and habilitation which is appropriate to the needs of such persons; or

(B) Does not meet the following minimum standards:

(i) Provision of a nourishing, well-balanced daily diet to the persons with developmental disabilities being served by the program.

(ii) Provision to such persons of appropriate and sufficient medical and dental services.

(iii) Prohibition of the use of physical restraint on such persons unless absolutely necessary and prohibition of the use of such restraint as a punishment or as a substitute for a habilitation program.

(iv) Prohibition on the excessive use of chemical restraints on such persons and the use of such restraints as punishment or as a substitute for a habilitation program or in quantities that interfere with services, treatment, or habilitation for such persons.

(v) Permission for close relatives of such persons to visit them at reasonable hours without prior notice.

(vi) Compliance with adequate fire and safety standards as may be promulgated by the Secretary.

(4) All programs for persons with developmental disabilities should meet standards which are designed to assure the most favorable possible outcome for those served, and—

(A) In the case of residential programs serving persons in need of comprehensive health-related, habilitative, or rehabilitative services, which are at least equivalent to those standards applicable to intermediate care facilities for the mentally retarded promulgated in regulations of the Secretary on January 17, 1974 (39 FR pt. II), as appropriate when taking into account the size of the institutions and the service delivery arrangements of the facilities of the programs;

(B) In the case of other residential programs for persons with developmental disabilities, which assure that care is appropriate to the needs of the persons being served by such programs, assure that the persons admitted to facilities of such programs are persons whose needs can be met through services provided by such facilities, and assure that the facilities under such programs provide for the humane care of the residents of the facilities are sanitary, and protect their rights; and

(C) In the case of nonresidential programs, which assure the care provided by such programs is appropriate to the persons served by the programs.

Subpart D establishes the practice and procedure for hearings pertaining to State conformity with State plans for the developmentally disabled and with Federal requirements. These regulations are found in §§ 1386.80 through 1386.112. The purpose of these regulations is to create in advance of any hearing, regular procedures for the initiation of hearings, for the determination of the requisite notice and parties, and for the rules which will govern the conduct of the hearing itself and post-hearing actions of the parties and of the Presiding Officer and/or Director of the Developmental Disabilities Office.

The Department believes that these regulations, which are followed by other agencies within the Department, such as the Social and Rehabilitation Service and the Administration on Aging (the latter on an *ad hoc* basis), are fair to all the parties concerned and protect the interests of all potential parties with the least amount of delay and expense consistent with the protection of the rights of all concerned.

PART 1387—DISCRETIONARY GRANTS PROGRAM

Subpart A of proposed Part 1387 addresses university affiliated facilities and is divided into two subdivisions, "Demonstration and training grants" and "Construction programs." Sections 1387.1 through 1387.4 deal with demonstration and training grants. The essential purpose of these regulations is to incorporate the requirements of Part B, Subpart 1 of the Act, as amended. The Department believes that little material additional to that contained in the statute is required or desirable for the purpose of implementing this part of the Act. Section 1387.2 does detail what an application for a demonstration and a training grant must contain. The Department believes that this carries out the directive of section 122(a) of the Act which requires the Secretary to establish the form and manner of making an application and of the required contents of an application. Section 1387.4 is proposed for the purpose of implementing what the Department believes to be the Congressional purpose of section 122(b): Of giving priority to applications for programs which will provide services within a community rather than in an institutional setting. The Department believes that this Congressional purpose is best served by repetition of that priority in the regulations, even though the statutory provision just noted is clear.

Subpart 2 of Part B of the Act deals with construction programs and is implemented in §§ 1387.10 through 1387.14 of the proposed regulations. Section 1387.11 implements the statutory mandate found in section 126 of the Act, as amended, which directs the Secretary to establish the form and manner of submitting an application and the information which such an application must contain.

The purpose of the remaining regulations of this subdivision is to implement the statutory directives found in Subpart 2 of the Act. The Department bases these regulations on its belief that little change is necessary because the statute itself is clear with respect to assurances that are required and the purposes of the program. Section 1387.11, dealing with the form of the application, provides that it will be in such form and manner, and contain such information, as the Secretary may require. This is based upon the Department's belief that flexibility is required in the construction program. The applications will be expected to contain, as a minimum, however, the assurances regarding consistency with the State plan, State planning council review, construction standards, and other statutory requirements detailed in § 1387.12.

Subpart B of Part 1387 pertains to special project grants. The purpose of this Subpart, which consists of the regulations at §§ 1387.20 through 1387.23, is to incorporate into the regulations the statutory purposes for which such grants may be made as set forth in section 145 (a) of the Act. These provisions are based upon the Departments' belief, that the statute clearly sets forth what are acceptable purposes of special project grants.

Eligible applicants are described in § 1387.22 and are limited to public and other nonprofit agencies, organizations, and institutions. This definition is consistent with, and implements section 145(a) of the Act.

Section 1387.23 deals with the application content and the procedures for submitting applications. The purpose of this regulation is to make clear that the Secretary, through guidelines, has the authority to elaborate on the content and procedures. The reason for leaving this to guidelines is that, since this Subpart relates to specific applications for special projects, as opposed to Statewide

plans, greater diversity in permissible or required content is desirable; therefore criteria will be carefully developed. The Department believes that this can be accomplished more efficiently through guidelines than through the regulatory process, particularly since guidelines afford greater flexibility to both the Department and the applicant.

Paragraph (b), of § 1387.23 of this proposed regulation expressly requires a copy of any application for special project grant (other than projects of national significance) to be submitted to the State planning council for review and comment in order to ensure that the proposed project is consistent with the State plan goals and objectives and the comprehensive planning and monitoring responsibilities of the State planning council.

In summary, many of these proposed rulemaking provisions are restated from the Act. The Department has sought to provide States with maximum flexibility within the terms of the Act and to avoid imposing additional burdens beyond those required by the law. The detailed provisions concerning the content of State plans included in these proposed regulations are required by the statute itself.

Prior to the adoption of the proposed regulations, consideration will be given to any comments, suggestions, or objections thereto which are submitted in writing to the Director, Developmental Disabilities Office, Department of Health, Education, and Welfare, 330 C Street, SW., Washington, D.C. 20201, on or before October 12, 1976. Comments received will be available for public inspection in Room 3070, Mary E. Switzer Building, of the Department's offices at 330 C Street, SW., Washington, D.C. 20201, on Monday through Friday of each week from 8:30 a.m. to 5 p.m. (202/245-0335). 0335).

(Catalog of Federal Domestic Assistance Program, Nos. 13.630 Developmental Disabilities—Basic Support; 13.631 Developmental Disabilities—Special Projects; 13.632 Developmental Disabilities—Demonstration and Training (University Affiliated Facilities)

Dated: June 21, 1976.

STANLEY B. THOMAS, JR.,
Assistant Secretary for Human Development.

Approved: August 20, 1976.

WILLIAM A. MORRILL,
Acting Secretary.

DEVELOPMENTAL DISABILITIES PROGRAM

PART 1385—GENERAL

Sec.
1385.1 Purpose of Act.
1385.2 Terms.
1385.3 Grants administrative requirements.
1385.4 Judicial review.
1385.5 State control of operations.
1385.6 Employment of handicapped individuals.
1385.7 Recovery.
1385.8 Good cause for other use of facility.
1385.9 Cooperative or joint effort between States and agencies.
1385.10 Awards.
1385.11 Assurances regarding evaluation system.

AUTHORITY: Pub. L. 91-517; Pub. L. 94-103.

§ 1385.1 Purpose of Act.

The purpose of the Act is to improve and coordinate the provision of services to persons with developmental disabilities and to establish a system for the protection and advocacy of rights for persons with developmental disabilities through:

(a) Grants to assist the States in developing and implementing a comprehensive and continuing plan for meeting the needs of the developmentally disabled;

(b) Support of activities which contribute to improving the condition of persons with developmental disabilities;

(c) Renovation and modernization of university affiliated facilities which demonstrate the provision of services for the developmentally disabled and support demonstration and training programs in institutions of higher education;

(d) Training specialized personnel needed for providing such services;

(e) Development of regional community programs for the developmentally disabled;

(f) Provision of technical assistance in the establishment of services and facilities for the developmentally disabled; and

(g) Development and demonstration of new and improved techniques for providing such services.

To these ends, Federal financial assistance is available through (1) basic support formula grants to States; (2) formula grants to States for effecting a system to protect and advocate the rights of developmentally disabled persons; (3) grants to university affiliated facilities and for satellite centers; and (4) grants to public and private nonprofit groups for demonstration projects and projects of national significance.

§ 1385.2 Terms.

(a) For purposes of Parts 1386 and 1387 of this chapter, the terms below are defined as follows:

(1) "Act" means the Developmental Disabilities Services and Facilities Construction Act, as amended by the Developmentally Disabled Assistance and Bill of Rights Act;

(2) "Construction" means (i) the construction of new buildings, acquisition, expansion, remodeling, and alteration of existing buildings, (ii) initial equipment for such buildings including medical and other transportation facilities, and (iii) architect's fees in connection with an approved project. Construction does not include the cost of offsite improvements or the cost of the acquisition of land.

(3) "Costs of administration and operation," for purposes of Part 1387 of this chapter, means those administrative and operating costs of university affiliated facilities which are necessary to support interdisciplinary training programs and demonstration facilities providing services to developmentally disabled persons. Eligible costs shall be specified in guidelines to be issued by the Secretary;

(4) "Cost of construction" means the amount found by the Secretary to be necessary for the construction of a project, approved under Parts 1386 and 1387 of this chapter;

(5) "Demonstration" means, for the purposes of Part 1387 of this chapter, (i) a pilot study or experimental attempt to provide more and better services than are available, for the purpose of testing or establishing standards or methods of service that are practicable and effective for general application in the developmental disabilities program; (ii) provision of a special type of service in order to test its value and to provide information on costs, methods of administration, methods of providing services, or techniques; or (iii) application in new settings of the results derived from previous research or practice for the purpose of determining the effectiveness of new procedures;

(6) "Developmental disability" means a disability of a person which (i) is attributable to mental retardation, cerebral palsy, epilepsy, or autism; (ii) is attributable to any other condition of a person found to be closely related to mental retardation because such condition results in similar impairment of general intellectual functioning or adaptive behavior to that of mentally retarded persons or requires treatment and services similar to those required for such persons; or (iii) is attributable to dyslexia resulting from a disability described in paragraph (a) (i) or (ii); (iv) originates before such person attains age eighteen; (v) has continued or can be expected to continue indefinitely; and (vi) constitutes a substantial handicap to such person's ability to function normally in society;

(7) "Director" means the Director of the Developmental Disabilities Office, Office of Human Development.

(8) "Equipment," for the purposes of construction under Parts 1386 and 1387 of this Chapter, means those items which are necessary for the initial operation of the facility, but does not include supplies such as food, fuel, drugs, and paper;

(9) "Exemplary services" means those specialized services, including adaptation of generic services, for the diagnosis, treatment, education, training, habilitation, and care of persons with developmental disabilities, conducted in or in conjunction with a university affiliated facility (or satellite) for purposes of demonstration or training, which are of replicable high quality;

(10) "Facility for persons with developmental disabilities" means a facility, or a specified portion of a facility, designed primarily for the delivery of one or more services to persons with one or more developmental disabilities;

(11) "Interdisciplinary training" means an integrated educational pro-

gram utilized reciprocally by two or more disciplines each of which is knowledgeable about or possesses, in relationship to common fields of endeavor, a basic language, a core body of knowledge, certain relevant skills, and an understanding of the attitudes, values, and methods of participating disciplines. Interdisciplinary training includes training with practicums which enhance the skills of the trainee in collaboration with or complementing the services rendered by members of other disciplines;

(12) "National Advisory Council" means the National Advisory Council on Services and Facilities for the Developmentally Disabled;

(13) "Nonprofit facility for persons with developmental disabilities" and "nonprofit private institution of higher learning" mean, respectively, a facility for persons with developmental disabilities and an institution of higher learning which are owned and operated by one or more nonprofit corporations or associations no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual; and the term "nonprofit private agency or organization" means an agency or organization which is such a corporation or association or which is owned and operated by one or more of such corporations or associations;

(14) "Population" as applied to any State means the population of that State as determined by the most recent official estimates by the U.S. Department of Commerce made available to the Secretary;

(15) "Project period" means the period of time, not exceeding three years, for which a project is approved for grant support with Federal funds. Such period may be extended by the Secretary beyond three years for a period not to exceed twelve months, and with or without additional funding, in order to permit continuation or completion of the same approved project. The approval and support of a project for the maximum project period shall not preclude additional support of that project beyond such period if such support of the continued project is requested, evaluated, and approved on the same basis as a new or initial application in acordance with § 1387.22 of this chapter;

(16) "Projects of national significance" means projects (i) designed to have a direct impact on developmental disabilities programs throughout the country; or (ii) having an objective or objectives which if achieved could be replicated or result in an improved delivery system for developmental disabilities services or affect national policies or standards; or (iii) involving activities to be conducted in a number of sites in various parts of the country as part of a unified program;

(17) "Public agency" means any State, unit of local government, combination of such States or units, or any department, agency, or instrumentality of any of the foregoing, including State institutions of higher education and hospitals, or any Indian tribal government;

(18) "Satellite center" means an entity which is associated with one or more university affiliated facilities and which functions as a community or regional extension of such university affiliated facilities in the delivery of training, services, and programs to the developmentally disabled and their families, to personnel of State agencies concerned with developmental disabilities, and to others responsible for the care of persons with developmental disabilities;

(19) "Secretary" means the Secretary of Health, Education, and Welfare, or a designee;

(20) "Services for persons with developmental disabilities" means specialized services or special adaptations of generic services directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with such a disability. Such services include: Diagnosis, evaluation, treatment, personal care, day care, domiciliary care, special living arrangements, training, education, sheltered employment, recreation, counseling of the individual with a developmental disability and of his family, protective and other social and socio-legal services, information and referral services, follow-along services, and transportation services necessary to assure delivery of services to persons of all ages with developmental disabilities;

(21) "State" means the several States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Trust Territory of the Pacific Islands;

(22) "State agency(ies)" means the State agency or agencies designated in the State plan to administer or supervise the administration of all or designated portions of the State plan;

(23) "State agency for construction" means the sole State agency designated to administer or supervise the administration of grants for construction of facilities for the developmentally disabled under the State plan;

(24) "State plan" means the document or documents submitted by the State to comply with the requirements for participation under Parts 1386 and 1387 of this chapter;

(25) "State planning council" (referred to alternately as "State council" or "council") means that body, the members of which are appointed by the Governor, which is responsible for supervising the development of comprehensive planning for persons with developmental disabilities, monitoring of the plan, and evaluating its results, and which serves as an advocate for persons with developmental disabilities;

(26) "Substantial handicap" means a physical and mental disability of such severity that, alone or in connection with social, legal, or economic constraints, it requires the provision of specialized services over an extended period of time directed toward the individual's social, personal, physical, or economic habilitation or rehabilitation;

(27) "Technical assistance" means the furnishing of consultative, technical, and informational services to States, local or other public or private agencies, organizations, or individuals in matters pertaining to planning, provision of services, construction of facilities, and the organization and management of facilities and programs for developmentally disabled persons;

(28) "Title" (except when it refers to the Code of Federal Regulations) means a fee simple, or such other estate or interest (including a leasehold on which the rental does not exceed 4 per centum of the value of the land) as the Secretary finds sufficient to assure for a period of not less than fifty years undisturbed use and possession for the purposes of construction and operation of the project;

(29) "University affiliated facility" means a public or other non-profit facility which is associated with, or is an integral of, a college or university, which aids in demonstrating the provision of specialized services for the diagnosis and treatment of persons with developmental disabilities, and which provides education and training (including interdisciplinary training) of personnel needed to render serves to persons with developmental disabilities;

(30) "Urban or rural poverty area" means a geographic area in which a percentage of the residents of the area have incomes below the poverty level as defined by the Secretary of Commerce;

(31) "Volunteer" means a person who provides a service on a non-paid basis, except for reimbursement of actual expenses, and who works in concert with other services toward shared objectives on an individual or group assignment.

§ 1385.3 Grants administrative requirements.

(a) The provisions of 45 CFR Part 74, establishing uniform administrative requirements and cost principles for grants to State and local governments, shall apply to all grants funded under Parts 1386 and 1387 of this chapter.

(b) Attention is called to the applicability, as cited therein, of the provisions of the following parts of Title 45 CFR to grants funded under Parts 1386 and 1387 of this chapter:

45 CFR Part 16—Department Grant Appeals Process
45 CFR Part 46—Protection of Human Subjects
45 CFR Part 75—Informal Grant Appeals Procedures, Subpart A—Indirect Cost Appeals
45 CFR Part 80—Nondiscrimination under Programs Receiving Federal Assistance through the Department of Health, Education, and Welfare—Effectuation of Title VI of Civil Rights Act of 1964
45 CFR Part 81—Practice and Procedure for Hearings under Part 80 of this Title.

(c) Each recipient of assistance under these Parts shall keep records (1) which fully disclose (i) the amount and disposition by such recipient of the proceeds of such assistance, (ii) the total cost of the project or undertaking in connection

with which such assistance is given or used, and (ii) the amount of that portion of the cost of the project or undertaking supplied by other sources, and (2) such other records as will facilitate an effective audit.

§ 1385.4 Judicial review.

If any State is dissatisfied with the Secretary's action under § 1386.2 or § 1386.15 such State may appeal to the United States Court of Appeals for the circuit in which such State is located, by filing a petition with such court within sixty days after such action, in accordance with 42 U.S.C. 2694.

§ 1385.5 State control of operations.

Except as otherwise specifically provided, nothing in Parts 1386 and 1387 of this chapter shall be construed as conferring on any Federal officer or employee the right to exercise any supervision or control over the administration, personnel, maintenance, or operation of any facility for persons with developmental disabilities with respect to which any funds have been or may be expended under these parts.

§ 1385.6 Employment of handicapped individuals.

As a condition for the receipt of financial assistance under Parts 1386 and 1387 of this chapter each recipient of such assistance shall take affirmative action to employ and advance in employment qualified handicapped individuals on the same terms and conditions required with respect to the employment of such individuals by the provisions of the Rehabilitation Act of 1973 which govern employment (a) by State rehabilitation agencies and rehabilitation facilities, and (b) under Federal contracts and subcontracts.

§ 1385.7 Recovery.

The State council shall promptly notify the Secretary in writing if, any time within 20 years after the completion of construction, any facility which received funds under Part 1386, Subpart A and Part 1387, Subpart A of this chapter is sold or transferred to any person, agency, or organization not qualified to file an application under the Act or not approved as a transferee by the State agency; or (b) ceases to be a public or other nonprofit facility for persons with developmental disabilities. Unless there is good cause, in conformance with § 1385.8, for releasing the applicant or other owner from obligation to continue such facility as a facility for developmentally disabled persons, the United States shall be entitled to recover from either the transferor or the transferee (or, in the case of a facility which has ceased to be a public or other nonprofit facility for persons with developmental disabilities, from the owners thereof) an amount bearing the same ratio to the then value (as determined by the agreement of the parties or by action brought in the district court of the United States for the district in which the facility is situated) of so much of such facility as constituted an approved project or projects, as the amount of the Federal participation bore to the cost of the construction of such project or projects. Such right of recovery shall not constitute a lien upon such facility prior to judgment.

§ 1385.8 Good cause for other use of facility.

If, within 20 years after completion of any construction for which a construction grant under the Act has been made, the facility shall cease to be a public or nonprofit facility for persons with developmental disabilities, the Secretary in determining whether there is good cause for releasing the applicant or other owner of the facility from the obligation to continue such facility as a public or other nonprofit facility for persons with developmental disabilities, shall take into consideration the extent to which:

(a) The facility will be devoted by the applicant or other owner to use for another public purpose which will promote the purposes of the Act; or

(b) There are reasonable assurances that for the remainder of the 20 year period other facilities not previously utilized for the care of persons with developmental disabilities will be so utilized and are substantially equivalent in nature and extent for such purposes.

§ 1385.9 Cooperative or joint effort between States and agencies.

An application providing for participating in a joint effort between States or among public or private agencies, or by any combination of such entities, shall be in accordance with the agreements in writing between the entities involved.

§ 1385.10 Awards.

All awards under Parts 1386 and 1387 of this chapter shall be in writing and shall set forth the amount awarded. Awards under Part 1387 of this chapter shall also specify the project period for which support is contemplated.

(a) Federal financial participation shall be available under Parts 1386 and 1387 of this chapter only for those activities approved in the grant award and only in the total amount approved in the award.

(b) Under Part 1386, Subpart A of this chapter, Federal financial participation may be available in expenditures made under the State plan including expenditures for the State council and the administration of the State plan, in accordance with applicable State laws, rules, regulations, and standards governing expenditures by State and local agencies. As a condition for Federal financial participation, the annual revision of the State plan and other required reports must be submitted by the State planning council and approved by the Secretary.

§ 1385.11 Assurances regarding evaluation system.

(a) Within six months after the development by the Secretary of an evaluation system in accordance with the Act, as a condition to the receipt of Federal financial assistance under Parts 1386 and 1387 of this chapter, each State shall submit to the Secretary a proposal for a time-phased method of implementing the system. Proposals shall be submitted in the form and at the time set forth in guidelines which will be issued by the Secretary.

(b) Within two years after the date of the development of such a system, each State shall provide assurances satisfactory to the Secretary that the State is using such a system.

PART 1386—FORMULA GRANT PROGRAMS

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AUTHORITY: Pub. L. 91-517; Pub. L. 94-103.

Subpart A—The State Plan

GENERAL

§ 1386.1 Purpose and assurances.

(a) *General.* Any State wishing to take advantage of Federal financial assistance under this Subpart must have a State plan approved annually by the Secretary.

(b) *Form and content.* The State plan shall contain, in the form prescribed by the Secretary, a specific description of the State's program, the plans and policies to the followed in carrying out the program, a description of the planning process as developed by the State council and utilized in developing the program, and such other information as prescribed by the Secretary. Basic principles for the planning processes and suggested alternative models will be described in guidelines issued by the Secretary. The State plan shall consist of the following parts which shall be amended, reaffirmed, or updated annually as applicable:

(1) A part setting forth data necessary to comply with assurances required in the Act, and all regulations, policies, and procedures which shall be established by the Secretary;

(2) A part which describes the State goals, annual objectives to achieve the goals, priorities, evaluation methods, and the rationale for annual changes;

(3) A part containing measurable objectives and strategies (i) to reduce and eventually eliminate inappropriate institutional placement of people with developmental disabilities; and (ii) to improve the quality of care and state of surroundings of persons for whom institutional care is appropriate;

(4) A part containing a design for implementation of the plan as set forth in § 1386.50; and

(5) A part containing the following assurances: (i) Authority of the State agency(ies): The State plan shall certify that the State agency(ies) has authority to administer or supervise the administration of all or portions of the State plan, and that nothing in the State plan is inconsistent with State law;

(ii) Funds made available to other agencies: (A) Part of the funds paid to the State will be made available to other public agencies or other nonprofit private agencies, institutions, and organizations for the purposes of carrying out the Act; (B) Such funds shall be expended in accordance with State procedures and standards and in accordane with the requirements obtained in these regulations and policies established by the Secretary;

(iii) State participation in carrying out the State plan: That there will be reasonable State financial participation in the cost of carrying out the State plan. Reasonable State participation shall include evidence of the following: (A) That there is an organizational unit responsible for program administration; (B) That adequate staff is available for administration of the plan; and (C) That State appropriated funds will be used in part to support the activities included under the State plan;

(iv) Anticipated contribution toward strengthening services: That the funds paid to the State will be used to make significant contribution toward strengthening services for persons with developmental disabilities in the various political subdivisions of the State, in order to improve the quality, extent, and scope of services.

(v) Maintenance of effort: That funds paid the State under the State plan will be used to supplement and, to the extent practicable, increase the level of funds that would otherwise be made available for the purposes for which the Federal funds are provided, and not to supplant such non-Federal funds. Compliance with such assurance will be deemed to have been met if the aggregate level of State, local, and private non-profit funds available in the State for activities supported under the approved State plan is at least no lower for any fiscal year than it was for the immediately preceding fiscal year as reported in required financial reports, provided that the Secretary may also take into consideration the extent to which the level of such funds for any fiscal year may have included emergency or other funds for an activity of a non-recurring nature;

(vi) Human rights and welfare of individuals receiving services: That the human rights of all persons (especially those without familiar protection) receiving services under Parts 1386 and 1387 of this chapter will be protected;

(vii) Services for persons unable to pay: That a reasonable volume of services will be furnished to persons unable to pay therefor. As used in this section, "persons unable to pay therefor" includes persons who are otherwise self-supporting but are unable to pay the full cost of needed services. Such services may be paid for wholly or partly out of public funds or contributions of individuals and private and charitable organizations, or may be contributed at the expense of the provider of services itself. In determining what constitutes a reasonable volume of services to persons unable to pay therefor, there shall be considered the amount of services that may be available through generic agencies. The requirements may be waived if it is demonstrated to the satisfaction of the State agency, subject to subsequent approval by the Secretary, that to furnish such services is not feasible financially;

(viii) Financial support for facilities: That adequate financial support will be available to complete the construction of, and to maintain and operate the facility when such construction is completed. Compliance with this assurance may be made by a showing from the grantee that adequate funds are or will be on deposit in a bank, or that program income from services provided is or will be adequate, or that State and local funds will be made available for maintenance and operation upon completion of construction; (ix) Payment of construction workers: That all laborers and mechanics employed by contractors or subcontractors in the performance of work on any construction project assisted with funds under this subpart and Subpart A, Part 1387 of this Chapter will be paid at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Act of March 3, 1931 (40 U.S.C. 276a-276a-5, known as the Davis-Bacon Act); and the Secretary of Labor shall have with respect to the labor standards specified in this paragraph the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 (15 FR 3176; 5 U.S.C. Appendix) and section 2 of the Act of June 13, 1934 (40 U.S.C. 276c); and

(x) Compliance with assurance for habilitation plans for developmentally disabled persons: Each State receiving an allotment under this Subpart after September 30, 1976, shall satisfactorily assure the Secretary that each program (including programs of any agency, facility, or project) which receives funds from the State's allotment under this Subpart has in effect for each developmentally disabled person who receives services from or under the program a habilitation plan and that such plans are reviewed annually.

(6) A part containing those requirements in §§ 1386.20 through 1386.49.

§ 1386.2 Plan submission and approval.

(a) The State plan (and its annual revisions) shall be submitted by the chairperson of the State council to the Secretary 60 days prior to the fiscal year for which the plan is applicable.

(b) Failure to submit an approvable plan or annual revision prior to the fiscal year for which the plan is applicable shall result in the loss of Federal financial participation in the cost of expenditures during the period of the fiscal year for which an approvable plan or annual or other revision has not been submitted.

(c) Any State plan, amendment, or revision meeting the requirements of the Act, this Subpart, and performance standards to be issued by the Secretary shall be approved.

(d) Final disapproval of any State plan or annual or other revision shall be determined by the Secretary; except that no State plan or any revision thereof shall be finally disapproved until after the State has been given reasonable notice and opportunity for a hearing in accordance with Subpart D of this part.

§ 1386.3 Designation of State agency(cies) for administration.

(a) The State plan shall name the designated State agency(ies) which shall administer all or designated portions of the State plan: provided, that a sole State agency is to be designated for administering or supervising the administration of grants for construction.

(b) If the State plan designates more than one State agency to administer the State plan, it shall set forth the portion of the program for which each State agency is responsible.

(c) The State may apportion its allotment among such agencies in proportion to the responsibilities assigned to such agencies for carrying out activities approved under the State plan. Funds so apportioned may be combined with other State or Federal funds authorized to be spent for other purposes of this part for which the funds are combined.

§ 1386.4 Identification of administrative program unit.

The State plan shall provide for and identify a program unit within the designated State administering agency, which has primary responsibility for proper and efficient administration of the State plan.

ALLOTMENTS, FEDERAL SHARE, AND PAYMENTS

§ 1386.10 Allotments to States.

The allotment to the several States shall be computed by the following formula:

(a) Two-thirds on the basis of total population weighted by financial need determined by the relative per capita income as shown by data supplied by the U.S. Department of Commerce for the three most recent consecutive years for which satisfactory data are available.

(b) One-third on the basis of a need factor based on the ratio of beneficiaries in the State receiving benefits under the Adult Disabled Child Program (section 202(d)(1)(B)(ii) of the Social Security Act) related to population of the State age 18–65 as bearing on the national total of such population weighted by the total population of the State.

(c) For the Virgin Islands, American Samoa, Guam, and the Trust Territory of the Pacific Islands, the allotment in any fiscal year beginning July 1, 1975, shall not be less than $50,000. The allotment of each other State in any fiscal year shall not be less than the greater of $150,000, or the amount of the allotment received by the State for the fiscal year ending June 30, 1974.

(d) If the amount appropriated for State allotments for any fiscal year exceeds $50,000,000, the minimum allotment of a State for such fiscal year shall be increased by an amount which bears the same ratio to the amount determined for such State as the difference between the amount so appropriated and the amount authorized to be appropriated for such fiscal year bears to $50,000,000.

§ 1386.11 Reallotment of funds.

The amount of an allotment to a State for a fiscal year which the Secretary determines will not be required by the State during the period for which it is available for the purpose for which allotted shall be available for reallotment by the Secretary from time to time, on such date or dates as may be fixed (but not earlier than thirty days after notice has been published of the Secretary's intention to make such reallotment in the FEDERAL REGISTER), to other States with respect to which such a determination has not been made, in proportion to the original allotments of such States for such fiscal year, but with such proportionate amount for any of such other States being reduced to the extent it exceeds the sum the Secretary estimates such State needs and will be able to use during such period; and the total of such reductions shall be similarly reallotted among the States whose proportionate amounts were not so reduced. Any amount so reallotted to a State for a fiscal year shall be deemed to be a part of its allotment for such fiscal year.

§ 1386.12 Conditions on uses of allotments.

(a) For the fiscal year ending June 30, 1976, not less than 10 per centum of each State's allotment shall be expended for the purpose of assisting in developing and implementing plans designed to eliminate inappropriate placement in institutions of persons with developmental disabilities. For each succeeding fiscal year, 30 per centum of the State's allotment shall be used for these purposes.

(b) Designation of allotment for construction. The State plan shall specify the per centum of the State's allotment in any fiscal year which is to be devoted to construction of facilities. Such per centum shall be not more than 10 per centum of the State's allotment or such lesser per centum as the Secretary may from time to time prescribe.

(c) Sums allotted to a State in a fiscal year and designated by it for construction and remaining unobligated at the end of such year shall remain available to such State for such purpose in the next fiscal year (and in such year only), in addition to the sums allotted to such State in such next fiscal year; except that if the maximum amount which may be specified for construction for a year plus any part of the amount so specified pursuant to such section for the preceding fiscal year and remaining unobligated at the end of such fiscal year is not sufficient to pay the Federal share of the cost of construction of a specific facility included in the construction program of the State, the amount specified for such preceding year shall remain available for a second additional year for the purpose of paying the Federal share of the cost of construction of such facility.

(d) Expenditures for proper and efficient administration of the State plan. (1) At the request of the designated State agency, a portion of the State's allotment shall be made available by the Secretary to pay not more than one-half of the expenditures described in this paragraph for proper and efficient administration of the approved State plan: *Provided*, That not more than 5 per centum or $50,000, whichever is less, shall be available for this purpose. (2) Payments under this section shall be made only on the condition that expenditures from State appropriations for administration of the State plan shall not be less than State expenditures for the fiscal year ending June 30, 1975. (3) Costs identified in the approved State plan as necessary for the administration of the program shall not include costs applicable to provision of services, planning or construction.

§ 1386.13 Federal share.

(a) Except as provided for in paragraph (b) of this section, the Federal share for a State may not exceed 75 per centum of the expenditures incurred by the State under the State plan.

(b) In the case of any project, program, or activity located in an area within a State determined by the Secretary to be an urban or rural poverty area, the Federal share may not exceed 90 per centum of the expenditures incurred by the State under the State plan.

(c) The non-Federal share of any project, program, or activity assisted by a grant under this Subpart may be provided in kind.

(d) For the purpose of determining the Federal share with respect to any activity, program, or project described in the State plan, expenditures on that activity, program, or project by a political subdivision of a State or by a nonprofit private entity shall be deemed to be expenditures by such State, subject to the condition that such expenditures may be included only when made by a political subdivision or nonprofit private agency, organization, or group to which the State agency has made available funds from Federal or State sources for carrying out

the approved State plan for the fiscal year.

§ 1386.14 Nonduplication.

In determining the amount of any State's Federal share of the expenditures incurred by it under its approved State plan, there shall be disregarded (a) any portion of such expenditures which are financed by Federal funds provided under any provision of the law other than this subpart, and (b) the amount of any non-Federal funds required to be expended as a condition of receipt of such Federal funds, except as otherwise provided by statute enacted subsequent to the effective date of Pub. L. 94-103, December 18, 1975.

§ 1386.15 Payments for planning, administration, services, and construction.

(a) From each State's allotment for a fiscal year under this subpart, the State shall be paid the Federal share of the expenditures, other than expenditures for construction, incurred during such year under its State plan approved under this part. Such payments shall be made from time to time in advance on the basis of estimates by the Secretary of the sums the State will expend under the State plan, except that such adjustments as may be necessary shall be made on account of previously made underpayments or overpayments under this section.

(b)(1) Payments for construction projects shall be made upon certification by the designated State agency for construction that, based upon its inspection, work has been performed upon a project, or purchases have been made in accordance with plans and specifications approved by the State agency and payment of an installment is due. If the State is not authorized by law to make payments to the applicant, the payment shall be made directly to the applicant. Certification shall be submitted to the Secretary in such form and at such times as required. Final payment for a project shall be made only upon certification by the State agency authorized by State law and designated by the Governor to administer construction grants that appropriate, periodic, and final inspections have been made by appropriate authorities in the State and that all applicable construction standards and other applicable standards and codes have been met. (2) If the Secretary, after investigation or otherwise, has reason to believe that any act (or failure to act) has occurred requiring withholding of payments (§ 1386.16) payment may be withheld in whole or in part, pending corrective action or action based on such hearing, after notice has been given to the designated State agency of opportunity for a hearing.

§ 1386.16 Withholding of payments.

(a) Whenever the Secretary, after reasonable notice and opportunity for hearing to the State council and the appropriate State agency(ies), finds that (1) there is a failure to comply substantially with any of the provisions required to be included in the State plan; (2) there is a failure to comply substantially with any regulations of the Secretary which are applicable to this Part, the Secretary shall notify such State council and agency(ies) that further payments will not be made to the State under this Subpart (or, in his discretion, that further payments will not be made to the State for activities in which there is such failure) until he is satisfied that there will no longer be such failure. Until he is so satisfied, the Secretary shall make no further payment under this Subpart to the State or shall limit further payment under this subpart to such State to activities in which there is no such failure.

(b) The State council shall review the actions of the State for the purpose of determining if the State is complying with the requirements of the State plan and its design for implementation. For the purpose of assisting the Secretary in the implementation of this section, the State council shall notify the Secretary of the results of its review.

§ 1386.17 Standards for services and construction of facilities.

(a) Standards for services for persons with developmental disabilities. [Reserved].

(b) Standards for construction and equipment of facilities.

(1) *General.* (i) The standards set forth in this section shall apply to all projects receiving Federal assistance under Subpart A, Part 1386 and Subpart A, Part 1387 of this chapter for construction of new buildings, acquisition, modernization, expansion, remodeling, and alteration of existing buildings and initial equipment for such buildings.

(ii) The designated State agency for construction shall determine in writing the occupancy classification of the building under the Life Safety Code (National Fire Protection Association (NFPA) Bulletin No. 101) 1973 edition or such future revisions as may be approved by the Secretary to ensure the capability of building occupants to respond in emergencies and for self-preservation.

(iii) The site location of any facility shall be community-based and comply with the National Environmental Policy Act, Pub. L. 91-190.

(2) *Design and construction of facilities.* (i) Project design and construction of facilities shall be done in accordance with one of the following model codes:

The Building Officials Conference of America—(BOCA).
The Uniform Building Code—(UBC).
The Southern Standard Building Code—(SSB).
The National Building Code—(NBC).

(ii) The codes listed below shall be used with respect to the following specific details:

Life safety: The National Fire Protection Association (NFPA), The Life Safety Code, Bulletin No. 101;
Air conditioning and ventilation systems: NFPA Standards, Nos. 90A or 90B;
Plumbing—National Standard Plumbing Code, (NAPHCC);
Electrical systems—National Electrical Code, NFPA Standard No. 70;
Elevators—American Standard Safety Code for Elevators, Dumbwaiters, and Escalators, ASA-A17 1960.

(3) *Special details.* (i) All doors to toilet rooms and bathrooms shall be equipped with hardware that will permit access in an emergency.

(ii) Hot water at the discharge spigot, faucet, or shower head where there is likelihood of direct skin contact (personal hygiene) shall not exceed 110 degrees Fahrenheit.

(iii) All paint and applied finishes used in furniture and furnishing shall be free of lead or other materials which may be harmful if ingested by humans, in accordance with Pub. L. 91-695, the Lead-Based Paint Poisoning Prevention Act;

(4) *Equipment.* Initial equipment of the kind and in the quantity necessary shall be provided for the complete functioning of the facility.

(5) *Architectural Barriers.* The building to be constructed, renovated, or modernized will comply with revised standards of the American National Standards Institute, Inc., adopted pursuant to the Architectural Barriers Act of 1968, 42 U.S.C. 4151-4156.

(6) *Hazards—Relocation.* The application, facility, and the operation thereof shall comply, as appropriate, with the following:

(i) Uniform Relocation Assistance Act— Pub. L. 91-646.
(ii) Historic Sites—Pub. L. 89-665.
(iii) Flood Insurance—Pub. L. 93-234.
(iv) Flood Hazards—Executive Order 11296.

STATE PLAN REQUIREMENTS—METHODS OF ADMINISTRATION

§ 1386.20 Methods of administration.

The State plan shall provide for such strategies, policies, and procedures as are necessary for the proper and efficient administration of the State plan. It shall include methods of informing the general public in the State of the kinds and locations of services and facilities which are available under the State plan, and that the State plan is available to interested parties in the State for their information.

§ 1386.21 Personnel administration.

(a) The State plan shall provide that methods of personnel administration will be established and maintained (in the State agencies administering or supervising the administration of the program and in local agencies administering the program) in conformity with the standards for a Merit System of Personnel Administration, 45 CFR Part 70, and any standards prescribed by the U.S. Civil Service Commission pursuant to section 208 of the Intergovernmental Personnel Act of 1970 modifying or superseding such standards.

(b) The State plan shall provide that the State agency will develop and implement an affirmative action plan for equal employment opportunity in all aspects

of personnel administration as specified in 45 CFR 70.4, Equal employment opportunity. The affirmative action plan will provide for specific action steps and timetables to assure equal employment opportunity. This plan shall be made available for review upon request.

§ 1386.22 Fiscal administration.

The State plan shall provide for such fiscal control and fund accounting procedures as may be necessary to assure the proper disbursement of and accounting for funds paid to the State under this Subpart.

§ 1386.23 Special financial and technical assistance to poverty areas.

The State plan shall provide that special financial and technical assistance shall be given to areas of urban or rural poverty in providing services and facilities for persons with developmental disabilities who are residents of such areas.

§ 1386.24 Reports.

The State plan shall provide that the State agency will make such reports in such form and containing such information, and at such time, as the Secretary may require and will comply with such provisions as he may find necessary to assure the correctness and verification of such reports. These reports include but are not limited to, (a) the Developmental Disabilities Office's program performance report and (b) financial reports.

§ 1386.25 Methods of evaluation.

(a) The State plan shall describe the methods to be used to assess the effectiveness and accomplishments of the State in meeting the needs of persons with developmental disabilities in the State.

(b) The State plan shall provide for the implementation of an evaluation system in accordance with § 1385.11 of this chapter.

§ 1386.26 Use of volunteers.

The State plan shall provide for the maximum utilization of all available community resources including volunteers serving under the Domestic Volunteer Services Act of 1973 (87 Stat. 394), and other appropriate voluntary organizations. The use of such services shall supplement, but shall not be in lieu of, paid employees.

§ 1386.27 Protection of employees' interests.

The State plan shall provide for fair and equitable arrangements (as determined by the Secretary after consultation with the Secretary of Labor) to protect the interests of employees affected by actions to carry out the plan described in § 1386.42 including arrangements designed to preserve employee rights and benefits and to provide training and retraining of such employees where necessary and arrangements under which maximum efforts will be made to guarantee the employment of such employees.

§ 1386.28 Membership of State planning council.

The State plan shall contain a current listing of the members of the State council, their names, and the constituency, agency, or organization each represents.

§ 1386.29 Identification of State planning council staff.

The State plan shall provide that the State council will be adequately staffed consistent with its duties and responsibilities and shall identify the staff assigned to the council.

§ 1386.30 Review of all other State plans.

The State plan shall provide, to the maximum extent feasible, for an opportunity for prior review and comment by the State council of all State plans of the State which relate to programs affecting persons with developmental disabilities. The State council's responsibilities in obtaining timely access to these other State plans, and the council's recourse if the plans are not made available will be detailed in guidelines to be issued by the Secretary.

§ 1386.31 Review of State plan.

The State plan shall provide that the State council will from time to time, but not less often than annually, review and evaluate its State plan approved under this subpart and submit appropriate revisions to the Secretary.

PROVISION OF SERVICES AND CONSTRUCTION OF FACILITIES

§ 1386.40 Goals and objectives.

The State plan shall describe clearly defined long-range goals and measurable short-term objectives, with primary consideration given to §§ 1386.42 through 1386.45 and to goals which may be established by the Secretary.

§ 1386.41 Allocation of grant funds based on State priorities.

(a) The State plan shall set forth priorities, policies, and procedures for the allocation and expenditure of funds under the plan, based on the established goals and objectives.

(b) Special consideration shall be given to those activities (1) which are located in areas of urban or rural poverty, or (2) which provide services to the more severly handicapped persons.

(c) The State plan shall provide that high priority for approval shall be given to those activities that hold significant promise toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of individuals with such a disability.

§ 1386.42 Deinstitutionalization.

The State plan goals, objectives, and strategies shall address: (a) The elimination of inappropriate placement in institutions of persons with developmental disabilities, and (b) the improvement of the quality of care and the state of surroundings of persons who are appropriately placed in institutions.

§ 1386.43 Establishment of community program alternatives to institutionalization.

The State plan shall support the establishment of community programs as alternatives to institutionalization and support such programs designed to provide services for the care and habilitation of persons with developmental disabilities, and which utilize, to the maximum extent feasible, the resources and personnel in related community programs to assure full coordination with such programs and to assure the provision of appropriate supplemental health, educational, or social services for persons with developmental disabilities.

§ 1386.44 Early screening, diagnosis, and evaluation.

The State plan shall provide for early screening, diagnosis, and evaluation (including maternal care, developmental screening, home care, infant and preschool stimulation programs, and parent counseling and training) of developmentally disabled infants and preschool children, particularly those with multiple handicaps.

§ 1386.45 Counseling, program coordination, advocacy, follow-along, and protective services.

The State plan shall provide for counseling, program coordination, follow-along services, protective services, and personal advocacy on behalf of developmentally disabled adults.

§ 1386.46 Quality, extent, and scope of services being provided or to be provided.

(a) The State plan shall describe the quality, extent, and scope of services being provided, or to be provided, in implementing the State plan, under such other State plans for Federally assisted State programs as may be specified by the Secretary, but in any case including the following Federally assisted programs: Education for the handicapped, vocational rehabilitation, public assistance, medical assistance, social services, maternal and child health, crippled children's services, and comprehensive health and mental health plans.

(b) The State plan shall describe the quality, extent, and scope of treatment, services, and habilitation being provided or to be provided in implementing the State plan to person with developmental disabilities from funds under this part.

(1) *Quality.* The State plan shall provide that services and facilities furnished under the State plan for persons with developmental disabilities will be in accordance with the standards set forth in § 1386.17.

(2) *Extent.* The State plan shall describe the extent of services to be provided under the plan including: (i) The kinds of needs to be met, and individuals to be served (such as type and severity of disabilities, age groups, economic status), (ii) the geographic location, distribution, and accessibility of services, and (iii) other relevant factors.

(3) *Scope.* The State plan shall describe the scope of the services to be provided, taking into account Federally-aided State and local programs involved, manpower, and financial resources, and other factors, directed toward the alleviation of developmental disabilities, or toward the social, personal, physical or economic habilitation, or rehabilitation of individuals with such disabilities.

(c) The State plan shall describe how Federal funds allotted to the State will be used to complement and augment rather than duplicate or replace services and facilities which are eligible for Federal assistance under other State programs.

§ 1386.47 Habilitation plans.

For the purpose of complying with the assurance regarding individual habilitation plans (§ 1386.1(b)(5)(x)), the State plan shall describe the methods to be used to facilitate an annual review of the individual plans. The State plan shall also describe the requirements of the habilitation plan which shall include at least the following: (a) The plan shall be in writing.

(b) The plan shall be developed jointly by (1) a representative(s) of the program primarily repsonsible for delivering or coordinating the delivery of services to the person for whom the plan is established, (2) such person, and (3) where appropriate, such person's parents or guardian or other representative.

(c) Such plan shall contain a statement of the long-term habilitation goals for the person and the intermediate habilitation objectives relating to the attainment of such goals. Such objectives shall be stated specifically and in sequence and shall be expressed in behavorial or other terms that provide measurable indices of progress. The plan shall (1) describe how the objectives will be achieved and the barriers that might intrefere with the achievement of them, (2) state objective criteria and an evaluation procedure and schedule for determining whether such goals and objectives are being achieved, and (3) provide for a program coordinator who will be responsible for the implementation of the plan.

(d) The plan shall contain a statement (in readily understandable form) of specific habilitation services to be provided, shall identify each agency which will deliver such services, shall describe the personnel (and their qualifications) necessary for the provision of such services, and shall specify the date of the initiation of each service to be provided and the anticipated duration of each such service.

(e) The plan shall specify the role and objectives of all parties to the implementation of the plan.

(f) Each habilitation plan shall be reviewed at least annually by the agency primarily responsible for the delivery of services to the person for whom the plan was established or responsible for the coordination of the delivery of services to such person. In the course of the review, such person and the person's parents or guardian or other representative shall be given an opportunity to review such plan and to participate in its revision.

§ 1386.48 Program for construction of facilities.

When a specific portion of the State's allotment is set aside for construction, the State plan shall provide for the development of a program of construction, renovation, or modernization of facilities for the provision of services for persons with developmental disabilities. Such a program shall (a) be based on a statewide inventory of existing facilities and a survey of need; (b) set forth the relative need in accordance with § 1386.41; (c) assign priority to the construction of projects in order of relative need insofar as funds are available for costs of construction and costs of maintenance and operation of such projects.

§ 1386.49 Opportunity for appeal and hearing.

The State plan shall provide for an opportunity for appeal to and hearing before the State agency for construction to every applicant for a construction project who is dissatisfied with any action of the State agency for construction regarding its application.

DESIGN FOR IMPLEMENTATION

§ 1386.50 Design for implementation of State plan.

(a) The State plan shall contain a design for implementation which shall include (1) details of the methods to be used to implement the State plan, (2) specific objectives to achieve the goals set forth in the State plan, (3) a listing of the programs and resources to be used to meet such objectives, (4) priorities for spending of funds provided under this Subpart, (5) a detailed plan for the use of such funds, and (6) a method for periodic evaluation of the design's effectiveness in meeting such objectives.

(b) The designated State agency is responsible for selecting from alternative strategies those best methods which will achieve the goals and annual objectives as developed by the State council. The design for implementation shall identify the programs and activities related to each of the objectives set forth in accordance with §§ 1386.40 through 1386.45 and the amount of funds allocated to each objective. The expenses of the State council are to be included in the design for implementation.

(c) The design for implementation is to be submitted annually as part of the annual State plan revision. Revisions to the design for implementation may be made as necessary by the designated State administering agency and shall be approved by the State council prior to submission to the Secretary.

Subpart B—State Planning Council

§ 1386.60 Role of State planning council.

The role of the State council is to supervise the development of the State plan by the designated State agency(ies) by providing guidance through the establishment of goals and objectives, identification of gaps, and the setting of priorities for the allocation of funds. In order to establish credible goals, the State council shall be responsible for needs assessment, analysis of programs currently and potentially capable of providing services to the developmentally disabled, and establishment of priorities to deal with identified gaps. The State council shall establish methods for monitoring and evaluating the implementation of the State plan to ensure that established goals and objectives are being achieved.

§ 1386.61 Establishment of State planning council.

(a) Each State which receives assistance under this part shall establish a State council which will serve as an advocate for persons with developmental disabilities. The members shall be appointed by the Governor of the State.

(b) Membership. Each State planning council shall at all times include in its membership representatives of the principal State agencies, local agencies, and nongovernmental agencies, and groups concerned with services to persons with developmental disabilities. As a minimum, the following Federal/State programs must be represented by the State agency membership on the council: Education of the handicapped, vocational rehabilitation, public assistance, medical assistance, social services, maternal and child health, crippled children's services, comprehensive health planning, and mental health. At least one-third of the membership of such a council shall consist of persons with developmental disabilities, or their parents or guardians, who are not officers or directors of an entity, or employees of any State agency or of any other entity, which receives funds or provides services under this part.

§ 1386.62 Adequate staff.

Each State receiving assistance under this Part shall engage for its State council personnel adequate to insure that the council has the capacity to fulfill its responsibilities.

§ 1386.63 Duties of the State planning council.

The State council shall—

(a) Supervise the development of and approve the State plan required by this part;

(b) Monitor and evaluate the implementation of such State plan;

(c) To the maximum extent feasible, review and comment on all State plans in the State which relate to programs affecting persons with developmental disabilities;

(d) Submit to the Secretary, through the Governor, such periodic reports as the Secretary may reasonably request; and

(e) Submit revisions of the State plan to the Secretary.

Subpart C—Protection and Advocacy of Individual Rights

§ 1386.70 State system for protection and advocacy of individual rights.

(a) As a condition to a State's receiving an allotment under Subpart A of this part, the State shall provide assurances satisfactory to the Secretary that not later than October 1, 1977, (1) the State will have in effect a system to protect and advocate the rights of persons with developmental disabilities, (2) such system will have the authority to pursue legal, administrative, and other appropriate remedies to insure the protection of the rights of such persons who are receiving treatment, services, or habilitation within the State, and (3) such system will be independent of any State agency which provides treatment, services, or habilitation to persons with developmental disabilities. The Secretary shall not make an allotment under Subpart A of this part to a State for any fiscal year beginning after September 30, 1977, unless the State has in effect such a system.

(b) The Governor shall designate the agency responsible for administering the protection and advocacy system and shall approve the advocacy plan prior to the approval of the Secretary. Such plan is to be submitted in accordance with this section and guidelines established by the Secretary.

(c) The allotment to the State shall be computed in accordance with § 1386.10 (a), (b) except that the allotment to a State in any fiscal year shall not be less than $20,000.

Subpart D—Practice and Procedure for Hearings to States on Conformity of Developmental Disabilities Plans to Federal Requirements

General

§ 1386.80 Definitions.

For purposes of this Subpart only:

(a) The term "DDO" means Developmental Disabilities Office.

(b) The term "designee" means any other individual so designated by the Secretary's delegate.

(c) The term "Secretary" means the Secretary of the Department of Health, Education, and Welfare.

(d) The term "Secretary's delegate" means the Assistant Secretary for Human Development, or the Director, Developmental Disabilities Office.

§ 1386.81 Scope of rules.

(a) The rules of procedure in this Subpart govern the practice for hearings afforded by the Department to States pursuant to § 1386.2 or § 1386.15, and the practice relating to decisions upon such hearings.

(b) Nothing in this part is intended to preclude or limit negotiations between the Department and the State, whether before, during, or after the hearing to resolve the issues which are, or otherwise would be, considered at the hearing. Such negotiations and resolution of issues are not part of the hearing, and are not governed by the rules in this subpart, except as expressly provided herein.

§ 1386.82 Records to be public.

All pleadings, correspondence, exhibits, transcripts of testimony, exceptions, briefs, decisions, and other documents filed in the docket in any proceeding may be inspected and copied in the office of the DDO Hearing Clerk. Inquiries may be made at the Central Information Center, Department of Health, Education, and Welfare, 330 Independence Avenue, S.W., Washington, D.C. 20201.

§ 1386.83 Use of gender and number.

As used in this part, words importing the singular number may extend and be applied to several persons or things, and vice versa. Words importing the masculine gender may be applied to females or organizations.

§ 1386.84 Suspension of rules.

Upon notice to all parties, the Secretary's delegate or the presiding officer, with respect to matters pending before him and within his jurisdiction, may modify or waive any rule in this part, unless otherwise expressly provided, upon determination that no party will be unduly prejudiced and the ends of justice will thereby be served.

§ 1386.85 Filing and service of papers.

(a) All papers in the proceedings shall be filed with the DDO Hearing Clerk in an original and two copies. Originals only of exhibits and transcripts of testimony need be filed.

(b) All papers in the proceedings shall be served on all parties by personal delivery or by mail. Service on the party's designated representative will be deemed service upon the party.

Preliminary Matters—Notice and Parties

§ 1386.90 Notice of hearing or opportunity for hearing.

Proceedings are commenced by mailing a notice of hearing or opportunity for hearing from the Secretary's delegate to the State. The notice shall state the time and place for the hearing, and the issues which will be considered, and shall be published in the Federal Register.

§ 1386.91 Time of hearing.

The hearing shall be scheduled not less than 30 days nor more than 60 days after the date notice of the hearing is furnished to the State.

§ 1386.92 Place.

The hearing shall be held in the city in which the regional office of the Department is located or in such other place as is fixed by the Secretary's delegate in light of the circumstances of the case, with due regard for the convenience and necessity of the parties or their representatives.

§ 1386.93 Issues at hearing.

(a) The Secretary's delegate may, prior to a hearing under § 1386.2 or § 1386.15, notify the State in writing of additional issues which will be considered at the hearing, and such notice shall be published in the Federal Register. If such notice is furnished to the State less than 20 days before the date of the hearing, the State or any other party, at its request, shall be granted a postponement of the hearing to a date 20 days after such notice was furnished, or such later date as may be agreed to by the Secretary's delegate.

(b) If, as a result of negotiations between the Department and the State, the submittal of a plan amendment, a change in the State program or other actions by the State, any issue is resolved in whole or in part, but new or modified issues are presented, as specified by the Secretary's delegate, the hearing shall proceed on such new or modified issues.

(c) (1) If at any time, whether prior to during or after the hearing the Secretary's delegate finds that the State has come into compliance with Federal requirements on any issue in whole or in part he shall remove such issue from the proceedings in whole or in part as may be appropriate. If all issues are removed he shall terminate the hearing.

(2) Prior to the removal of any issue from the hearing in whole or in part the Secretary's delegate shall provide all parties other than the Department and the State (see § 1386.94(b)) with the statement of his intention and the reasons therefor and a copy of the proposed State plan provision on which the State and he have settled and the parties shall have oportunity to submit in writing within 15 days, for the consideration of the Secretary's delegate and for the record, their views as to, or any information bearing upon, the merits of the proposed plan provision and the merits of the reasons of the Secretary's delegate for removing the issue from the hearing.

(d) The issues considered at the hearing shall be limited to those issues of which the State is notified as provided in § 1386.90 and paragraph (a) of this section, and new or modified issues described in paragraph (b) of this section, and shall not include issues or parts of issues removed from the proceedings pursuant to paragraph (c) of this section.

§ 1386.94 Request to participate in hearing.

(a) The Department and the State are parties to the hearing without making a specific request to participate.

(b) (1) Other individuals or groups may be recognized as parties, if the issues to be considered at the hearing have caused them injury and their is within the zone of interests to be protected by the governing Federal statute.

(2) Any individual or group wishing to participate as a party shall file a petition with the DDO Hearing Clerk within 15 days after notice of the hearing has been published in the Federal Register, and shall serve a copy on each party of record at that time in accordance with § 1386.85(b). Such petition shall concisely state (i) petitioner's interest in the proceeding, (ii) who will appear for petitioner, (iii) the issues on which petitioner wishes to participate, and (iv) whether petitioner intends to present witnesses.

(3) Any party may, within 5 days of receipt of such petition, file comments thereon.

(4) The presiding officer shall promptly determine whether each petitioner has the requisite interest in the proceedings and shall permit or deny participation accordingly. Where petitions to participate as parties are made by individuals or groups with common interests, the presiding officer may request all such petitioners to designate a single representative, or he may recognize one or more of such petitioners to represent all such petitioners. The presiding officer shall give each petitioner written notice of the decision on his petition, and if the petition is denied, he shall briefly state the grounds for denial.

(c) (1) Any interested person or organization wishing to participate as amicus curiae shall file a petition with the DDO Hearing Clerk before the commencement of the hearing. Such petition shall concisely state (i) the petitioner's interest in the hearing, (ii) who will represent the petitioner, and (iii) the issues on which petitioner intends to present argument. The presiding officer may grant the petition if he finds that the petitioner has a legitimate interest in the proceedings, that such participation will not unduly delay the outcome and may contribute materially to the proper disposition of the issues. An amicus curiae is not a party but may participate as provided in this paragraph.

(2) An amicus curiae may present a brief oral statement at the hearing, at the point in the proceedings specified by the presiding officer. He may submit a written statement of position to the presiding officer prior to the beginning of a hearing, and shall serve a copy on each party. He may also submit a brief or written statement at such time as the parties submit briefs, and shall serve a copy on each party.

HEARING PROCEDURES

§ 1386.100 Who presides.

(a) The presiding officer at a hearing shall be the Secretary's delegate or his designee.

(b) The designation of the presiding officer shall be in writing. A copy of the designation shall be served on all parties.

§ 1386.101 Authority of presiding officer.

(a) The presiding officer shall have the duty to conduct a fair hearing, to avoid delay, maintain order, and make a record of the proceedings. He shall have all powers necessary to accomplish these ends, including, but not limited to, the power to:

(1) Change the date, time, and place of the hearing, upon due notice to the parties. This includes the power to continue the hearing in whole or in part.

(2) Hold conferences to settle or simplify the issues in a proceeding, or to consider other matters that may aid in the expeditious disposition of the proceeding.

(3) Regulate participation of parties and amici curiae and require parties and amici curiae to state their position with respect to the various issues in the proceeding.

(4) Administer oaths and affirmations.

(5) Rule on motions and other procedural items on matters pending before him, including issuance of protective orders or other relief to a party against whom discovery is sought.

(6) Regulate the course of the hearing and conduct of counsel therein.

(7) Examine witnesses.

(8) Receive, rule on, exclude, or limit evidence or discovery.

(9) Fix the time for filing motions, petitions, briefs, or other items in matters pending before him.

(10) If the presiding officer is the Secretary's delegate, make a final decision.

(11) If the presiding officer is a hearing examiner, certify the entire record including his recommended findings and proposed decision to the Secretary's delegate.

(12) Take any action authorized by the rules in this part or in conformance with the provisions of 5 U.S.C 551–559.

(b) The presiding officer does not have authority to compel by subpoena the production of witnesses, papers, or other evidence.

(c) If the presiding officer is a hearing examiner, his authority pertains to the issues of compliance by a State with Federal requirements which are to be considered at the hearing, and does not extend to the question of whether, in case of any noncompliance, Federal payments will not be made in respect to the entire State plan or will be limited to categories under or parts of the State plan affected by such noncompliance.

§ 1386.102 Rights of parties.

All parties may:

(a) Appear by counsel or other authorized representative, in all hearing proceedings.

(b) Participate in any prehearing conference held by the presiding officer.

(c) Agree to stipulations as to facts which will be made a part of the record.

(d) Make opening statements at the hearing.

(e) Present relevant evidence on the issues at the hearing.

(f) Present witnesses who then must be available for cross-examination by all other parties.

(g) Present oral arguments at the hearing.

(h) Submit written briefs, proposed findings of fact, and proposed conclusions of law, after the hearing.

§ 1386.103 Discovery.

The Department and any party named in the Notice issued pursuant to § 1386.90 shall have the right to conduct discovery (including depositions) against opposing parties. Rules 26–37 of the Federal Rules of Civil Procedure shall apply to such proceedings; there will be no fixed rule on priority of discovery. Upon written motion, the presiding officer shall promptly rule upon any objection to such discovery action initiated pursuant to this section. The presiding officer shall also have the power to grant a protective order or relief to any party against whom discovery is sought and to restrict or control discovery so as to prevent undue delay in the conduct of the hearing. Upon the failure of any party to make discovery, the presiding officer may, in his discretion, issue any order and impose any sanction (other than contempt orders) authorized by Rule 37 of the Federal Rules of Civil Procedure.

§ 1386.104 Evidentiary purpose.

The hearing is directed to receiving factual evidence and expert opinion testimony related to the issues in the proceeding. Argument will not be received in evidence; rather it should be presented in statements, memoranda, or briefs, as determined by the presiding officer. Brief opening statements, which shall be limited to statement of the party's position and what he intends to prove, may be made at hearings.

§ 1386.105 Evidence.

(a) *Testimony.* Testimony shall be given orally under oath or affirmation by witnesses at the hearing. Witnesses shall be available at the hearing for cross-examination by all parties.

(b) *Stipulations and exhibits.* Two or more parties may agree to stipulations of fact. Such stipulations, or any exhibit proposed by any party, shall be exchanged at the prehearing conference or otherwise prior to the hearing if the presiding officer so requires.

(c) *Rules of evidence.* Technical rules of evidence shall not apply to hearings conducted pursuant to this part, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination shall be applied where reasonably necessary by the presiding officer. A witness may be cross-examined on any matter material to the proceeding without regard to the scope of his direct examination. The presiding officer may exclude irrelevant, immaterial, or unduly repetitious evidence. All documents and other evidence offered or taken for the record shall be open to examination by the parties and opportunity shall be given to refute facts and arguments advanced on either side of the issues.

§ 1386.106 Exclusion from hearing for misconduct.

Disrespectful, disorderly, or contumacious language or contemptuous conduct, refusal to comply with directions, or continued use of dilatory tactics by any person at the hearing before a presiding officer shall constitute grounds for immediate exclusion of such person from the hearing by the presiding officer.

§ 1386.107 Unsponsored written material.

Letters expressing views or urging action and other unsponsored written material regarding matters in issue in a hearing will be placed in the correspondence section of the docket of the

proceeding. These data are not deemed part of the evidence or record in the hearing.

§ 1386.108 Official transcript.

The Department will designate the official reporter for all hearings. The official transcripts of testimony taken, together with any stipulations, exhibits, briefs, or memoranda of law filed therewith shall be filed with the Department. Transcripts of testimony in hearings may be obtained from the official reporter by the parties and the public at rates not to exceed the maximum rates fixed by the contract between the Department and the reporter. Upon notice to all parties, the presiding officer may authorize corrections to the transcript which involve matters of substance.

§ 1386.109 Record for decision.

The transcript of testimony, exhibits, and all papers and requests filed in the proceedings, except the correspondence section of the docket, including rulings and any recommended or initial decision shall constitute the exclusive record for decision.

POSTHEARING PROCEDURES, DECISIONS

§ 1386.110 Posthearing briefs.

The presiding officer shall fix the time for filing posthearing briefs which shall not exceed 20 days after termination of the hearing. Such briefs may contain proposed findings of fact and conclusions of law, and, if permitted, reply briefs.

§ 1386.111 Decisions following hearing.

(a) If the Secretary's delegate is the presiding officer, he shall, when the time for submission of posthearing briefs has expired, issue his decision within 60 days.

(b) (1) If a hearing examiner is the presiding officer, he shall, within 30 days of the time for submission of posthearing briefs has expired, certify the entire record, including his recommended findings and proposed decision, to the Secretary's delegate. The Secretary's delegate shall serve a copy of the recommended findings and proposed decision upon all parties, and amici, if any.

(2) Any party may, within 20 days, file with the Secretary's delegate exceptions to the recommended findings and proposed decision and a supporting brief or statement.

(3) The Secretary's delegate shall thereupon review the recommended decision and, within 60 days of its issuance, issue his own decision.

(c) If the Secretary's delegate concludes:

(1) In the case of a hearing under § 1386.2, that a State plan does not comply with Federal requirements, he shall also specify whether the State's total allotment for the fiscal year will not be authorized for the State or whether, in the exercise of his discretion, the allotment will be limited to categories under or parts of the State plan not affected by such noncompliance;

(2) In the case of a hearing pursuant to § 1386.15, that the State is not complying with requirements of the State plan he shall also specify whether further payments will not be made to the State or whether, in the exercise of his discretion, payments will be limited to categories under or parts of the State plan not affected by such noncompliance. The Secretary's delegate may ask the parties for recommendations or briefs or may hold conferences of the parties on these questions.

(d) The decision of the Secretary's delegate under this section shall be the final decision of the Secretary and shall constitute "final agency action" within the meaning of 5 U.S.C. 704 and the "Secretary's action" within the meaning of section 138 of the Act. The Secretary's delegate's decision shall be promptly served on all parties, and amici, if any.

§ 1386.112 Effective date of decision by Secretary's delegate.

(a) If, in the case of a hearing pursuant to § 1386.2, the Secretary's delegate concludes that a State plan does not comply with Federal requirements, and his decision provides that the allotment will be authorized but limited to categories under or parts of the State plan not affected by such noncompliance, his decision shall specify the effective date for the authorization of the allotment.

(b) If, in the case of a hearing pursuant to § 1386.15, the Secretary's delegate concludes that the State is not complying with requirements of the State plan, his decision that further payments will not be made to the State, or payments will be limited to categories under or parts of the State plan not affected, shall specify the effective date for the withholding of Federal funds.

(c) The effective date shall not be earlier than the date of the decision of the Secretary's delegate and shall not be later than the first day of the next calendar quarter.

(d) The provisions of this section may not be waived pursuant to § 1386.84.

PART 1387—DISCRETIONARY GRANT PROGRAMS

Subpart A—University Affiliated Facilities

DEMONSTRATION AND TRAINING GRANTS

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AUTHORITY: Pub. L. 91-517; Pub. L. 94-103.

Subpart A—University Affiliated Facilities

DEMONSTRATION AND TRAINING GRANTS

§ 1387.1 Purpose of grant funds.

Demonstration and training grants authorized under the Act may be made for the purpose of:

(a) Assisting university affiliated facilities in meeting the cost of administering and operating demonstration facilities for the provision of exemplary services for persons with developmental disabilities, or for interdisciplinary training programs for personnel needed to render specialized services for persons with developmental disabilities;

(b) Supplementing one or more university affiliated facilities funded under these regulations to conduct a feasibility study of the ways in which a satellite center can be established and operated in areas not presently served by a university affiliated facility. These satellite centers shall provide services to persons with developmental disabilities in coordination with existing facilities funded under these regulations or from any other Federally supported program. Supplemental grants to university affiliated facilities for a feasibility study may not exceed $25,000; and

(c) Paying part of the costs of establishing and assisting satellite centers in meeting part of their administration and operation costs.

§ 1387.2 Application content.

Applications for demonstration and training grants may be submitted at the time and in the manner and detail prescribed by the Secretary in guidelines, and shall include the following:

(a) In the case of grants to university affiliated facilities for administration and operation and demonstration facilities and interdisciplinary training programs, evidence of how such university affiliated facility shall provide (1) interdisciplinary training programs for personnel needed to render specialized services to persons with developmental disabilities, and (2) services for persons with developmental disabilities by the operation of demonstration facilities;

(b) In the case of applications for an increase in the amount of a demonstration and training grant to meet the cost of conducting a feasibility study, assurances that such study shall be carried out in consultation with the State planning council for the State in which the facility is located and where the satellite center would be established; and according to guidelines to be issued by the Secretary;

(c) In the case of an application for a grant to establish or to administer and operate a satellite center(s), a copy of the feasibility study which documents the need for such satellite, conducted in accordance with section 121(a)(2) of the Act;

(d) For all applications, an assurance that the services and training programs to be supported are licensed, if necessary,

according to the applicable State law(s) and also meet appropriate accreditation standards;

(e) For all applications, reasonable assurance that the grant will not result in decreased State, local, or other non-Federal funds for services for persons with developmental disabilities and for the training of personnel to provide such services; and

(f) For all applications, a statement describing the general methodology by which the project will be evaluated to determine whether objectives have been achieved.

§ 1387.3 Eligible applicants.

The applicant must be a public or nonprofit university affiliated facility or a satellite which has been found eligible to operate such a center.

§ 1387.4 Priority.

In approving applications, the Secretary shall give priority consideration to those programs which demonstrate an ability and commitment to provide within a community, rather than in an institution, services for persons with developmental disabilities.

CONSTRUCTION PROGRAM

§ 1387.10 Purpose.

The Secretary may make grants to university affiliated facilities to assist (a) in meeting the costs of the renovation or modernization of buildings which are being used in connection with an activity assisted by a demonstration and training grant; and (b) for the construction, renovation, or modernization of buildings to be used as satellite centers.

§ 1387.11 Application form.

An application shall be submitted in such form and manner and contain such information as the Secretary may require in addition to assurances required in § 1387.12.

§ 1387.12 Application assurances.

An application for a construction grant under this subpart may be approved by the Secretary only if it is supported by such reasonable assurances as may be required by law or executive order:

(a) The application for assistance is consistent with the appropriate State developmental disabilities plan;

(b) The application has been reviewed and commented upon by the appropriate State council;

(c) The facilities upon completion of construction will meet standards set forth in § 1386.17;

(d) The plans and specifications for the project to be assisted by the grant applied for are in accordance with § 1386.17(b);

(e) Title to the site for such project is or will be vested in the applicant or, in the case of a satellite center, in a public or other nonprofit entity which is to operate the center;

(f) Adequate financial support will be available in conformance with requirements of § 1386.1(b)(5)(viii) of these regulations;

(g) All laborers and mechanics will be paid in accordance with requirements set forth in § 1386.1(b)(5)(ix);

(h) No amendment to an approved application resulting in a substantial change in scope of work, function, or safety of the facility shall be put into effect without prior approval of the Secretary.

§ 1387.13 Approval of applications.

Applications under this subpart shall be reviewed by the Secretary who shall approve or disapprove the proposed project in whole or in part on the basis of established criteria.

§ 1387.14 Priority.

In approving applications under this subpart, the Secretary shall give priority consideration to university affiliated facilities funded under this Subpart for costs of renovating or modernizing existing buildings to enable them to comply with the Architectural Barriers Act of 1968.

Subpart B—Special Project Grants

§ 1387.20 Eligible projects.

Special project grants may be made to assist in meeting the costs of conducting an activity or program, hereinafter referred to as "project," that is intended and designed to benefit persons with developmental disabilities. No project (other than projects of national significance) shall be eligible unless the State or States in which it will be conducted has a State plan approved under Part 1386, Subpart A of this chapter, and unless it addresses one or more of the following:

(a) Demonstrations (and research and evaluation in connection therewith) for establishing programs which hold promise of expanding or otherwise improving services to persons with developmental disabilities (especially those who are disadvantaged or multihandicapped), including programs for parent counseling and training, early screening and intervention, infant and preschool children, seizure control systems, legal advocacy, and community-based counseling, care, housing, and other services or systems necessary to maintain a person with developmental disabilities in the community;

(b) Public awareness and public education programs to assist in the elimination of social, attitudinal, and environmental barriers confronted by persons with developmental disabilities;

(c) Coordinating and using all availability community resources in meeting the needs of persons with developmental disabilities (especially those from disadvantaged backgrounds);

(d) Demonstrations of the provision of services to persons with developmental disabilities who are also disadvantaged because of their economic status;

(e) Technical assistance relating to services and facilities for persons with developmental disabilities, including assistance in State and local planning or administration respecting such services and facilities;

(f) Training of specialized personnel needed for the provision of services for persons with developmental disabilities or for research directly related to such training;

(g) Developing or demonstrating new or improved techniques for the provision of services to persons with developmental disabilities (including model integrated service projects);

(h) Gathering and disseminating information relating to developmental disabilities; and

(i) Improving the quality of services provided in and the administration of programs for such persons.

The Secretary may establish criteria for projects designed to achieve the purposes of the Act to the fullest extent possible within the limitation of available Federal resources.

§ 1387.21 Nonduplication of Federal funds.

In determining the amount of any grant for the costs of any project under this subpart, there shall be excluded, except as otherwise provided by statute enacted subsequent to December 16, 1975, from such cost an amount equal to the sum of (a) the amount of any other Federal grant which the applicant has obtained, or is assured of obtaining, with respect to such project under any provision of law enacted prior to October 4, 1975, and (b) the amount of any non-Federal funds required to be expended as a condition of such other Federal grant.

§ 1387.22 Eligible applicants.

Applications may be made by public and other nonprofit agencies, organizations, and institutions.

§ 1387.23 Application content and procedures.

(a) Applications for grants under this subpart shall be submitted in the form and detail, and in accordance with procedures and deadline dates, as prescribed by the Secretary in guidelines.

(b) The applicant shall provide, concurrently, a copy of an application for a grant under this Subpart to the appropriate State planning council for review and comment at the time the application is submitted to the Secretary. Comment with regard to a particular application must be submitted to the Secretary by the State planning council within 30 days from the date of submission by the applicant in order to assure consideration of such comments.

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